Nebraska Law Review

Volume 57 | Issue 1 Article 3

1978

Section 609 of the Nebraska Evidence Rules: A Need for Clarification

Kirk E. Naylor Jr.
Naylor & Keefe, naylorlaw@hotmail.com

Commentary

By Kirk E. Naylor, Jr.*

Section 609 of the Nebraska Evidence Rules: A Need for Clarification

I. INTRODUCTION

On August the 24th, 1975, new rules of evidence became effective in the courts of this state. Known officially as the Nebraska Evidence Rules,[1] and codified as Chapter 27 of the Nebraska Revised Statutes, the statutes contained therein represent the end result of an effort to modernize and simplify the evidence rules of this jurisdiction.[2]

As most Nebraska lawyers now know, the new evidence rules bear a striking resemblance to the Federal Rules of Evidence, which became effective less than a month before the Nebraska Evidence Rules. In fact, the working draft for the new rules of evidence in Nebraska was based upon the Proposed Federal Rules of Evidence, which were approved by the United States Supreme Court on November 20th, 1972.[3]

The various drafts of the Federal Rules of Evidence were naturally based in large part upon the prior evidentiary rules which were developed and refined by Congress and the federal courts. This being the case, it is to be expected that trial lawyers in Nebraska would have serious questions about the application of a new evidence code which is based, to a large extent, upon the prior law of other jurisdictions.

Section 27-609 of the Nebraska Revised Statutes[4] is the codification of that portion of the Nebraska Evidence Rules relating to the

---

* B.S. 1968, Nebraska Wesleyan University; J.D. 1971, University of Nebraska College of Law. Partner, Naylor & Keefe, Lincoln, Nebraska.

1. NEB. REV. STAT. § 27-1103 (Reissue 1975).
2. [1975] LEGIS. REC. 4781 (Remarks of Senator Luedtke).
3. Proposed Nebraska Rules of Evidence 5 (Aug. 1, 1973) (codified at NEB. REV. STAT. §§ 27-101 to 1103 (Reissue 1975).
4. The chapter designation of the Nebraska Evidence Rules, the same being 27, and the title designation of the Federal Rules of Evidence, the

impeachment of witnesses by the introduction of evidence relating to prior convictions. That statute provides:

> (1) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment.
>
> (2) Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of such conviction or of the release of the witness from confinement, whichever is the later date.
>
> (3) Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon, annulment, or other equivalent procedure which was based on innocence.
>
> (4) Evidence of juvenile adjudications is not admissible under this rule.
>
> (5) Pendency of an appeal renders evidence of a conviction inadmissible.[5]

Impeaching the credibility of a witness by evidence of prior criminal convictions is one of the most, if not the most, frequently used means of attacking the credibility of a witness in a criminal case, although this method of impeaching credibility is certainly not limited in application to criminal cases. Particularly when used to impeach the credibility of a defendant in a criminal case, the use of this impeachment technique often has a devastating effect.[6] In fact, as any experienced criminal defense lawyer knows, one of the primary considerations in whether or not to advise a defendant to testify in his own behalf is the extent to which he might be cross-examined, for the claimed purpose of impeachment, regarding his prior criminal record.

Recognizing the obvious dangers of prejudice in placing the fact of a defendant's past criminal convictions before the jury, many courts in recent years have sought to limit this method of impeachment. One jurisdiction has, by statute, acted to virtually eliminate this form of impeachment.[7]

Recognizing the impact that impeachment by prior conviction

---

same being 28, will be omitted when discussing sections of the rules in this article.

5. NEB. REV. STAT. § 27-609 (Reissue 1975).
6. A study undertaken indicates that the introduction of evidence regarding the past convictions of an accused tends to increase the rate of conviction by 27 percent. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).
7. HAW. REV. STAT. § 621-22 (Supp. 1975).

can have upon the jury's evaluation of the credibility of any witness, it is only natural that Nebraska trial lawyers would want to take a close look at the provisions of rule 609. The provisions of this statute are well worth examination, for not only does rule 609 work apparent and substantial changes in the scope of impeachment by prior conviction, but it also raises some serious unanswered questions regarding both the extent of the interrogation permitted in connection with, and the trial judge's ability to control, this form of impeachment. It is with the existence and significance of these unanswered questions that this article deals.

II. EXTENT OF INTERROGATION

Extent of interrogation, as this phrase is used herein, simply refers to the questions which may be asked, and the types of information which may be elicited, during cross-examination regarding prior convictions. It should be kept in mind that this article deals only with the proper extent of interrogation when the purpose is to elicit facts regarding a prior conviction for the purpose of impeaching credibility. It does not deal with the proper method of presenting evidence regarding a prior criminal act where the purpose of introducing such evidence is not to impeach credibility, but rather is to prove motive, opportunity, identity, and the like.[8]

The phrase "extent of interrogation" was chosen to describe the subject, rather than method of proof, because the primary means of presenting proof of a prior crime for purposes of impeaching credibility, under both the prior law in Nebraska and under rule 609, is by examination of the witness whose credibility is to be impeached. Only if the witness fails to truthfully answer questions regarding his or her prior convictions can extrinsic evidence be offered.[9]

---

8. *See* NEB. REV. STAT. § 27-404(2) (Reissue 1975).
9. NEB. REV. STAT. § 25-1214 (Reissue 1964) (repealed 1975), repealed when the Nebraska Evidence Rules went into effect, provided: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof." Additionally, several cases had held that where the witness admitted the previous convictions on examination, it was error to allow the record to be introduced. State v. Kallos, 193 Neb. 113, 225 N.W.2d 553 (1975); Sulley v. State, 116 Neb. 783, 230 N.W. 846 (1930).

Rule 609(1) provides, in part, that evidence that the witness has been convicted of a crime is admissible "if elicited from him or established by public record during the cross-examination." Although the quoted section of the rule is identical to the federal rule, the wording is unfortunate, since if the witness denies the prior conviction it would be extremely awkward to introduce the record of the conviction on

Prior to the effective date of rule 609, the Nebraska law regarding the grade of offense which could properly be elicited for the purpose of impeaching credibility was quite concise. No offense below the grade of felony could be used.[10] In addition, the types of questions which could be asked regarding the prior conviction were extremely limited. The witness could be asked if he or she had previously been convicted of a felony. If the answer was in the affirmative, the only other allowable questions regarded the number of such convictions. Assuming that the witness answered truthfully, no other evidence regarding prior convictions, for the purpose of impeaching the witness, could be introduced. The rule in this regard was absolute, and the prosecutor who went beyond the very limited examination described here, while impeaching a defendant in a criminal case, ran a very substantial risk of mistrial or of the conviction being reversed on appeal.[11]

Nebraska Rule 609 by its language clearly changes the previous rule regarding the limitation upon the grade of offense which can be elicited for purposes of impeachment. No longer does it appear that all felony offenses may be used for impeaching credibility. Rule 609(1)(a) provides that evidence of conviction of a crime which was punishable "by death or imprisonment in excess of one year" shall be admitted.[12] The term "felony" in this jurisdiction is defined by statute to describe any offense "as may be punished with death or imprisonment in the Nebraska Penal and Correctional Complex."[13] There are a number of crimes defined by Nebraska law for which the maximum punishment is imprisonment in the Nebraska Penal and Correctional Complex for one year.[14] Unless

---

cross-examination. Because even a certified copy of the record of the prior conviction is not admissible without evidence that the person to whom the record refers is one and the same person sought to be impeached, a witness would ordinarily be necessary to establish that fact and thus lay proper foundation for the introduction of the record. How can this be smoothly done if the rule provides that the record must be introduced on cross-examination? The state of Maine recognized this problem, and adopted a modified form of Federal Rule 609, deleting the words "if elicited from him or established by public record during cross-examination." ME. R. EVID. 609, *following* ME. REV. STAT. tit. 14 (Supp. 1975).

10. NEB. REV. STAT. § 25-1214 (Reissue 1964) (repealed 1975). *See* Garcia v. State, 159 Neb. 571, 68 N.W.2d 151 (1955); Crawford v. State, 116 Neb. 629, 218 N.W. 421 (1928).
11. *See* State v. Kallos, 193 Neb. 113, 225 N.W.2d 553 (1975); Erving v. State, 174 Neb. 90, 116 N.W.2d 7 (1962).
12. *See* note 42 and accompanying text *infra*.
13. NEB. REV. STAT. § 29-102 (Reissue 1975).
14. This list of offenses includes, but is not limited to: possession of more than one pound of marijuana, NEB. REV. STAT. § 28-4,125(5) (Reissue

otherwise admissible under rule 609(1)(b), as an offense involving dishonesty or false statement, it is apparent that such felony offenses are not admissible to impeach credibility.

It is not likely that the exclusion from rule 609 of felonies carrying a maximum prison sentence of one year was deliberate. It is more likely that the Nebraska Supreme Court Committee on Practice and Procedure, in developing the proposed rules by modifying the then latest draft of the Federal Rules of Evidence, simply failed to modify rule 609 to conform with the Nebraska, rather than federal, definition of a felony offense. By federal statute, "any offense punishable by death or imprisonment for a term *exceeding* one year is a felony."[15]

Nebraska Rule 609(1)(b), as most Nebraska lawyers now know, greatly alters the prior Nebraska evidence rules regarding impeachment by evidence of prior crimes in that this provision allows impeachment by proof of prior conviction, whether the offense was a felony or misdemeanor, so long as the offense "involved dishonesty or false statement." This change, at least in the form of dicta, has been recognized by the Nebraska Supreme Court.[16]

While it may take a lawyer's mind to discern those crimes involving dishonesty from those which include conduct which one must assume to be honest, although criminal, the task is certainly not impossible. The Conference Committee of the Congress, in its report regarding the then proposed Federal Rule 609, described the types of crimes which include "dishonesty and false statement," as follows:

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.[17]

1975); sexual assault in the second degree (without serious injury), NEB. REV. STAT. § 28-408.04(2) (Reissue 1975); abandonment of wife or child, NEB. REV. STAT. § 28-446 (Reissue 1975); abortion, NEB. REV. STAT. § 28-4,153 (Reissue 1975).

15. 18 U.S.C. § 1(1) (1970) (emphasis added). It is worth noting that Maine, in adopting a modified version of Federal Rule 609, substituted the phrase "one year or more" for the language "in excess of one year," as contained in the federal rule, so as to encompass all felonies proscribed by Maine law. ME. R. EVID. 609, *following* ME. REV. STAT. tit. 14 (Supp. 1975).
16. *See* State v. Lang, 197 Neb. 47, 246 N.W.2d 608 (1976).
17. H.R. REP. No. 93-1597, 93d Cong., 2d Sess. 9, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7103.

Federal decisions following the adoption of Federal Rule 609 are also of some help in developing an understanding of the types of offenses which do, and do not, involve "dishonesty or false statement;"[18] although it should be pointed out that agreement between the federal circuit courts has not been total as to what crimes are admissible as falling within this category.[19] In any event, as of the printing of this article the Nebraska Supreme Court has not acted to define the types of crimes which are admissible, for purposes of impeachment, under Nebraska Rule 609(1)(b).

The very nature of the crimes now apparently admissible to impeach credibility under Nebraska Rule 609 obviously means that the range of permissible questions which can be asked of a witness to impeach credibility must be expanded. No longer will it suffice to be limited to asking the witness whether he or she has been previously convicted of a felony, and if so, the number of times. As pointed out, rule 609 does not necessarily make all felony convictions admissible for impeachment, but does make certain types of misdemeanors admissible. Both of these changes are a marked departure from prior law in this jurisdiction.[20] It is likewise not possible to effectively retain the spirit of the prior Nebraska law under rule 609. In other words, it will no longer be possible to limit the inquiry into the prior record of the witness as strictly as before.

In cross-examination of the witness it would hardly be workable to inquire of the witness, in the words of the rule, whether he or she had been previously convicted of a crime which had, as its possible punishment, imprisonment in excess of one year or death, or which involved dishonesty or false statement. This is especially true if the examination were to be limited to stating the question in the words of the rule. It is not unreasonable to expect that a

18. *See, e.g.*, United States v. Lossiah, 537 F.2d 1250 (4th Cir. 1976) (convictions for drunk driving, public intoxication, and disorderly conduct not admissible); United States v. Millings, 535 F.2d 121 (D.C. Cir. 1976) (convictions for carrying a pistol without a license and for possession of drugs not admissible); Carlson v. Javurek, 526 F.2d 202 (8th Cir. 1975) (convictions for assault and battery not admissible).

19. *See* Virgin Islands v. Toto, 529 F.2d 278 (3d Cir. 1976) (conviction for petty larceny not admissible); Virgin Islands v. Testamark, 528 F.2d 742 (3d Cir. 1976) (conviction for petty larceny not admissible). *But see* United States v. Carden, 529 F.2d 443 (5th Cir. 1976) (conviction for petty larceny admissible).

20. Some of the more common misdemeanor offenses which almost certainly will be recognized as crimes involving dishonesty and false statement include obtaining money by false pretenses, NEB. REV. STAT. § 28-1207 (Reissue 1975); no-fund and insufficient fund checks, *id.* §§ 28-1212 to 1215; giving false information to a police officer, *id.* § 28-744; concealing stolen property, *id.* § 28-513.

witness would know whether or not he had previously been convicted of a felony, as opposed to a misdemeanor. It would not seem likely, however, that the average witness would be able to deal effectively with the relatively complicated analysis that goes into determining what types of offenses can be used for impeachment under rule 609.

The type of restricted inquiry mentioned above would, aside from being cumbersome and confusing, work an injustice on the witness who is making a good faith effort to answer the inquiry honestly. The witness, for instance, might give an affirmative answer to the inquiry by concluding that the misdemeanor offense of possession of marijuana is a crime of dishonesty. On the other hand, the witness previously convicted of passing an insufficient fund check might answer the inquiry in the negative, being honestly ignorant of the fact that his or her prior conviction fell within the vague category described by the question. The incorrect response would allow the attorney conducting the examination to introduce a copy of the record of conviction. This would quite possibly give the jury the impression that the witness was intentionally attempting to deceive them. Such an impression, especially when inaccurately drawn about a defendant who testifies in his own behalf, could have serious consequences.

It is obvious that the adoption of rule 609 will require changes in the extent to which information may be elicited regarding the prior criminal convictions of the testifying witness for purposes of impeaching credibility. Only by allowing specific reference by counsel to the nature of the previous conviction can opposing counsel and the court form an opinion as to whether the crime being inquired of is properly admissible for purposes of impeachment. Specific inquiry into the nature of the prior crime is also necessary to enable the witness to answer the question completely and accurately.

No drastic change in the form and extent of the examination conducted to impeach the credibility of a witness, by eliciting evidence of a prior criminal conviction, was necessitated in the federal courts by the adoption of Federal Rule 609.[21] This is due primarily to the fact that prior to the adoption of the Federal Rules of Evidence, more information could properly be elicited regarding the prior conviction in federal courts than was proper in the Nebraska courts. It was, and still is, ordinarily permissible in federal courts to elicit, by examination of the witness, the specific nature and date

21. FED. R. EVID. 609.

of the prior conviction, and in some cases the sentence received following a conviction.[22]

While Nebraska courts must lift the traditional limits placed upon the impeachment examination to at least allow inquiry as to the specific nature of the crime resulting in the previous conviction of the witness, no opinion of the Nebraska Supreme Court has yet approved such a change. The only decision of the supreme court handed down since the effective date of the Nebraska Evidence Rules to deal with the area being considered is *State v. Boss*.[23] The opinion in *Boss*, filed nearly six months after the adoption of the Nebraska Evidence Rules, does little to remove the uncertainty from this area.

The appellant in *Boss* assigned as error the fact that the trial court had allowed the prosecutor, over defendant's objection, to elicit certain information from a prosecution rebuttal witness, a probation officer, regarding defendant's probation which had followed a prior conviction. The court, speaking through Clinton, J., in holding that it was error for the prosecutor to have been allowed to elicit such testimony, stated: "When a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number thereof, but no details as to the nature of the charges or other details may be elicited or received."[24]

Although the trial of the appellant in *Boss* clearly took place prior to the effective date of the Nebraska Evidence Rules, it is curious that the opinion in *Boss* did not indicate that the scope of the permissible examination, regarding impeachment by evidence of prior crimes, had changed with the adoption of the new rules. In fact, the opinion gives the impression, probably unintentional, that the traditional limits upon the type of questions which may be asked to impeach credibility by proof of prior convictions remain unchanged.

To those Nebraska lawyers who practice in the trial courts, particularly those who are engaged in the practice of criminal law, it is important that changes be adopted and approved regarding

---

22. *See* United States v. Wright, 542 F.2d 975 (7th Cir. 1976); United States v. Carter, 528 F.2d 844 (8th Cir. 1975); United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975); United States v. Miller, 478 F.2d 768 (4th Cir. 1973); United States v. Dow, 457 F.2d 246 (7th Cir. 1972); Beaudine v. United States, 368 F.2d 417 (5th Cir. 1966).
23. 195 Neb. 467, 238 N.W.2d 639 (1976).
24. *Id.* at 473, 238 N.W.2d at 644 (citing State v. Craig, 192 Neb. 347, 220 N.W.2d 241 (1974)).

the type of examination which may be undertaken in attempting to impeach the credibility of a witness by evidence of prior convictions. At the present time, for instance, the lack of clarity in the law in this area benefits neither the prosecutor nor the defense attorney.

The prosecutor undoubtedly wants to take full advantage of rule 609 in cross-examining the defendant. He may have some hesitancy, however, in attempting to elicit information about the specific nature of a prior conviction out of fear that he might, by violating the traditional restrictions upon such inquiries, risk a mistrial. The defense attorney, on the other hand, needs to know what kinds of specific questions might properly be put to his client, regarding his prior record, if he elects to testify. Knowing the extent to which the jury may become familiar with his client's criminal record will depend, in large part, upon the type of examination which is ultimately allowed under rule 609.

III. JUDICIAL DISCRETION

As pointed out, Nebraska Rule 609 will almost certainly cause an increase in the information the jury will obtain regarding the prior convictions of each witness who testifies. Under prior law, the jury would learn only that the witness had been previously convicted of a felony, and the number of such convictions. Effective impeachment under rule 609, however, will necessitate the jury learning at least the specific nature of each admissible prior conviction.

While allowing an expanded inquiry regarding the nature of the prior conviction, or convictions, of the witness certainly facilitates the fullest use of Nebraska Rule 609 for purposes of impeaching credibility, such an expanded inquiry is not without risks to the fairness of the trial process. If the witness whose credibility is being impeached is the defendant in a criminal case, the more specific the information which may be elicited about the defendant's prior criminal record, the more likely it will be that the defendant's right to a fair trial will be adversely affected.

Except in those rare circumstances when evidence of prior crimes of the accused in a criminal case is admissible to show motive, opportunity, intent, or a limited number of related factors, the only legitimate purpose in introducing evidence regarding the prior convictions of the accused is to impeach his credibility. Impeaching credibility by eliciting evidence of prior criminal convictions is based upon the time honored assumption that a person who has

been convicted of a crime, at least a serious crime, is less likely to testify truthfully. This assumption, in turn, is based upon the general belief that a person who commits a crime has bad character, and a person with bad character is more likely to lie under oath.[25]

While almost all jurisdictions have traditionally accepted the assumption that prior conviction of a crime has a bearing upon credibility, the types and classes of convictions admissible for this purpose have never been uniform. Some jurisdictions, such as Nebraska, have traditionally limited impeachment by prior conviction to allowing evidence regarding the fact of a prior felony conviction. Other jurisdictions have allowed any crime, whether felony or misdemeanor, to be used for impeachment, while still others have limited impeachment to evidence of special types of crime, such as crimes involving moral turpitude.[26]

In recent years some courts have become more sensitive to the unfair prejudice which can be caused by putting evidence of criminal defendants' prior convictions before the jury.[27] While the courts have routinely instructed juries that evidence of prior crimes could be used solely to affect the weight of the testimony given by the accused, and not to infer that the accused was more likely to have committed the crime charged by virtue of the fact that he or she had been previously convicted of a crime, there has been a growing uneasiness with the idea that juries can routinely follow such an instruction.[28] It is very hard to believe that even the most conscientious juror can escape the improper and prejudicial assumption that a person previously convicted is more likely to be guilty than the defendant with no prior criminal record. This is especially true when the prior conviction was an extremely severe offense.

In an effort to minimize the risk of improper prejudice attendant to this method of impeachment, there has been a growing demand that the trial judge be able to exercise some control over the impeachment process.[29] The concern has been that the probative

25. *See* 3 J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 609 [02] at 609-55 to 609-57 (1976).
26. *See* MCCORMICK, EVIDENCE § 43 (2d ed. 1972).
27. *See* United States v. Gloria, 494 F.2d 477 (5th Cir. 1974); United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968); Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).
28. *See* H. KALVEN & H. ZEISEL, *supra* note 6, at 160; Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Criminal Record*, 4 COLUM. J. L. & SOC. PROB. 215 (1968); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961).
29. Spector, *Impeachment Through Past Convictions: A Time for Reform*, 18 DE PAUL L. REV. 1 (1968).

value of some types of convictions is outweighed by the risk of prejudice if the precise nature of the conviction were to be put before the jury.

Any evaluation of the changes worked by the adoption of Nebraska Rule 609 upon the extent to which evidence regarding prior convictions may properly be placed before the jury, for purposes of impeachment, must necessarily include an analysis of the extent to which the trial judge has discretion to exclude otherwise admissible evidence of prior convictions in the particular case being tried because of the possibility of prejudice. While rule 609, as indicated, necessarily allows more specific evidence regarding the nature of prior convictions to be put before the jury, there is a real question as to whether the trial judge has any discretion under the rule to exclude such otherwise admissible evidence because of the risk of undue prejudice. To understand the source of this concern, it is necessary to have some familiarity with the history of Federal Rule 609, and the extent to which that rule controls the discretion of federal trial judges in admitting or excluding evidence of prior convictions.

In *Luck v. United States*[30] and later in *Brown v. United States*,[31] the Circuit Court of Appeals for the District of Columbia became the first court to propose that the trial judge systematically evaluate the probative value of the conviction against the possible prejudice which might result from its use as evidence before ruling upon its admissibility as impeachment evidence.[32] Prior to *Luck*, the law in the District of Columbia had been that the prosecutor had the right to impeach the defendant-witness so long as the crime was one admissible for impeachment by statute. The court in *Luck* seized upon the word "may" as contained in the statute to support the conclusion that the trial judge was intended to have discretion in whether to admit evidence of a prior conviction. The court directed that the trial judge should take into account, in exercising his discretion, the following factors:

> [T]he nature of prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction.[33]

30. 348 F.2d 763 (D.C. Cir. 1965).
31. 370 F.2d 242 (D.C. Cir. 1966).
32. *See* Spector, *Impeaching the Defendant by His Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward*, 1 LOY. CHI. L. J. 247 (1970).
33. Luck v. United States, 348 F.2d at 769.

The vesting of discretion in the trial judge to exclude or allow evidence of convictions to impeach credibility, following the decision in *Luck*, began to win gradual acceptance in other federal circuits.[34] Therefore, it comes as little surprise that the issue of judicial discretion in this area was raised in the debate preceding the final adoption of Federal Rule 609 by Congress.

Those familiar with the evolution of the Federal Rules of Evidence into the final form adopted by Congress know that the rules went through a series of drafts. It was not, however, the final draft of the Federal Rules of Evidence which became the working model for the Nebraska Evidence Rules. The draft of the rules used by the Nebraska Supreme Court Committee on Practice and Procedure was that draft of the Federal Rules of Evidence with a proposed effective date of July 1, 1973.[35] It was this draft of the rules which was accepted by the United States Supreme Court but which was later modified by Congress before final adoption.

Rule 609(a) of the above-mentioned draft, which was accepted verbatim by the Nebraska Committee in the proposed Nebraska Rules of Evidence, stated:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.[36]

While the federal draft was the virtual starting point for congressional consideration of a final rule of evidence governing impeachment by prior conviction, it was, with the exception of a single substantive change in wording, identical to rule 609(1) of the present Nebraska Evidence Rules. The congressional debate over reform of the rules regarding impeachment by proof of prior conviction was not duplicated in this jurisdiction.

The House of Representatives, after extensive committee consideration and floor debate, approved the version of rule 609 proposed by the House Judiciary Committee. That version of the rule limited impeachment by prior conviction to crimes involving dishonesty or false statement.[37] The Senate, however, took a more traditional

---

34. *See, e.g.*, United States v. Allison, 414 F.2d 407 (9th Cir. 1969); United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968); United States v. Holdreth, 387 F.2d 328 (4th Cir. 1967).
35. *See* Proposed Nebraska Rules of Evidence 5-6 (Aug. 1, 1973).
36. Proposed Nebraska Rules of Evidence § 609(a) (Aug. 1, 1973) (codified at NEB. REV. STAT. § 27-609 (Reissue 1975).
37. 120 CONG. REC. 2366 (1974). The Judiciary Committee, in proposing

stance, approving a version of rule 609 which allowed impeachment by evidence of past felony offenses as well as crimes involving dishonesty or false statement.[38] The substantial differences between the versions of the rule adopted by the House and Senate caused the rule to be considered by the Conference Committee of the Congress. It was there that the final version of Federal Rule 609(a) was drafted. The final draft of Federal Rule 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of punishment.[39]

The substantive changes in the final version of the rule from that which Congress originally considered are readily apparent. First, the phrase "shall be admitted" was substituted for "is admissible." Second, the words "and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant" have been added in relation to the admissibility of prior felony convictions for purposes of impeachment.

The purposes of these changes, as explained by the Conference Committee in its Joint Statement explaining the compromise on Federal Rule 609, were as follows:

> The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.
>
> With regard to the discretionary standard established by paragraph (1) of Rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant.* The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community), was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness

---

a version of the rule limiting impeachment by prior conviction to those offenses involving dishonesty and false statement, cited the danger of unfair prejudice if impeachment were allowed by eliciting evidence of prior felony convictions regardless of type. *See* H.R. REP. No. 93-650, 93d Cong., 1st Sess. 11 (1973).

38. 120 CONG. REC. 37085 (1974).

39. FED. R. EVID. 609.

> is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.[40]

Since the final formulation of Federal Rule 609, the federal courts have interpreted this rule consistently with this foregoing statement of legislative intent. In short, except for the discretion embodied within Federal Rule 609, the trial judge *has no discretion* in excluding evidence of prior convictions otherwise admissible under the rule. This means, as a practical matter, that the federal trial judge has the power to exclude only that evidence regarding prior felony convictions not involving dishonesty or false statement. So long as the prior conviction is based upon a crime involving dishonesty or false statement, he has no power to keep evidence of the offense from being introduced for purposes of impeachment if it otherwise meets the criteria for admissibility under the rule.[41]

Because of the interpretation which has been placed upon Federal Rule 609 and the wording of Nebraska Rule 609, a strong argument can be made that the Nebraska trial judge has no power to exclude, on the grounds of undue prejudice, evidence of *any* prior conviction otherwise admissible for the purposes of impeachment under the rule. In other words, the trial judge must admit evidence of any prior crime which falls within the categories defined by Nebraska Rule 609(1) and which cannot be excluded from evidence by application of any of the remaining subsections of the statute.

The most compelling argument that the Nebraska trial judge has no discretion in allowing otherwise proper impeachment under Nebraska Rule 609 is the fact that the statute contains the phrase "shall be admitted" as opposed to the words "may be" as contained in the Proposed Nebraska Rules of Evidence. The legislative listing of Nebraska Rule 609 does not indicate why the substitution of words was made. It is only known that the change was made while the rule was being considered by the Judiciary Committee of the Unicameral.

It is, of course, a basic rule of statutory construction that the word "shall," as contained within a statute, normally indicates that a mandatory interpretation is required.[42] The term "may," on the

---

40. REPORT, *supra* note 17, at 9-10, [1974] U.S. CODE CONG. & AD. NEWS at 7103.
41. *See, e.g.*, United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976); United States v. Mahone, 537 F.2d 922 (7th Cir. 1976); United States v. Belt, 514 F.2d 837 (D.C. Cir. 1975).
42. Pelzer v. City of Bellevue, 198 Neb. 19, 251 N.W.2d 662 (1977); Thomas

other hand, when used within a statute, generally indicates that a discretionary, and not mandatory, application of the statute is permissible.[43] While this does not suggest that the use of the term "shall," as opposed to "may," is dispositive of the issue of whether the trial judge does or does not have the discretion to exclude evidence otherwise admissible under rule 609 on the grounds of unfair prejudice, one must wonder why the wording of the rule was altered. Absent a clear legislative intent which can otherwise be established, it is logical to conclude that the rule was changed for the reason that the legislative intent was to prevent the trial judge from exercising any discretion in applying Nebraska Rule 609.

The argument that the trial judge has no discretion in controlling the introduction of convictions, otherwise admissible under Nebraska Rule 609, is strengthened by the language employed by Congress in drafting the final version of Federal Rule 609, where the legislative intent was clearly to limit the discretion of the trial judge. Federal Rule 609 contains the identical phrase "shall be admitted." Further, in granting the federal trial judge limited discretion to exclude evidence of felony convictions not involving dishonesty or false statement, Congress specifically provided the limited discretion in the words of the rule. Those words, the same being "and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant," are not included in Nebraska Rule 609.

The natural response to the argument that the Nebraska trial judge has no power to exclude even the most prejudicial evidence regarding a prior conviction of a criminal defendant, assuming evidence of the conviction is otherwise admissible under rule 609, is to point to the powers given the trial judge by Nebraska Rule 403. This rule, identical to the federal rule bearing the same designation, provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[44]

While it is probable that Nebraska Rule 403 will be construed by the courts to give trial judges the power to exclude evidence

---

v. Sternhagen, 178 Neb. 578, 134 N.W.2d 237 (1965); Trobough v. State, 120 Neb. 453, 233 N.W. 452 (1930).

43. State v. Noll, 171 Neb. 831, 108 N.W.2d 108 (1961); Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N.W.2d 119 (1957).

44. NEB. REV. STAT. § 27-403 (Reissue 1975).

of prior convictions otherwise admissible under rule 609, on the grounds of undue prejudice, the contrary legislative intent evident in the drafting of Federal Rule 609, as well as the subsequent interpretation of the Federal Rules of Evidence by the courts, is a powerful argument against this position. Perhaps the use of the term "shall" in Nebraska Rule 609 was simply a case of poor draftsmanship, but a reading of the entire code indicates that the terms "shall" and "may" were not otherwise used interchangeably. It would be difficult to find another provision in the code which contains the term "shall" and construct a plausible argument that the provision is discretionary in application.

If Nebraska Rule 609 were to be construed to allow the trial judge only that power to exclude evidence of prior convictions as is specifically provided by the subsections thereof, it would truly be damaging to the fairness of the trial process. This is especially true when it is noted that examination of a witness under rule 609 will almost certainly permit the nature of the crime, which resulted in the prior conviction, to be placed before the jury. It is, after all, the evidence of the specific nature of the prior crime which can create unfair prejudice, especially in the case of the defendant-witness.

Even if rule 609 is finally interpreted by the Nebraska Supreme Court to be subject to the discretion vested in the trial judge by Nebraska Rule 403, the criminal defense attorney should be mindful that, at least in the case of prior crimes not involving dishonesty or false statement, it will still be more difficult to keep unduly prejudicial evidence regarding prior convictions from the jury than is true under the federal rule. This would be an important difference between the two rules, since the threat of undue prejudice is of great concern in a criminal case when the defendant's right to a fair trial is at stake.

Federal Rule 609 makes evidence of prior felony convictions, except as otherwise admissible as crimes involving dishonesty or false statement, admissible only if "the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant."[45] This language places the burden of proof upon the prosecution to demonstrate that the probative value of the evidence of the prior conviction outweighs the possibility of prejudice.[46] In addition, this language has been interpreted to mandate that a hearing upon the admissibility of such evidence be held prior

45. *See* note 39 and accompanying text *supra*.
46. United States v. Mahone, 537 F.2d 922 (7th Cir. 1976); *See* 3 J. WEINSTEIN & M. BERGER, *supra* note 25, ¶ 609 [03], at 609-68 to 609-80.

to the offer of evidence.[47] If the trial judge rules that the evidence is admissible, the trial judge should make a specific finding that the prejudicial effect of the evidence to the defendant is outweighed by its probative value.[48]

The language of Nebraska Rule 403, if it were ruled to be applicable to Nebraska Rule 609, clearly states that the evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." This language, as compared to the test for admissibility included in Federal Rule 609, would make it more difficult for defense counsel to succeed in keeping evidence of the prior conviction from the jury for the reason of unfair prejudice. In view of the wording of Nebraska Rule 403, it is logical to assume that the defense attorney would carry the burden of proving that the probative value of the conviction was substantially outweighed by the danger of unfair prejudice.

Assuming that rule 403 does give the trial judge discretion over admitting evidence of prior crimes for the purpose of impeaching credibility, it will be extremely important that defense counsel be aware of the need for an advance ruling on the admissibility of the evidence. Since rule 403, unlike Federal Rule 609, can hardly be interpreted to require the trial judge to pass upon the issue of prejudice as a matter of course, defense counsel will be required to raise the issue of undue prejudice so that the admissibility of the evidence can be decided outside the presence of the jury.

IV. CONCLUSION

The impeachment of the credibility of adverse witnesses is certainly one of the most frequently used weapons of the trial lawyer. One of the basic methods of impeachment of credibility is to place before the jury as much information as possible regarding the prior convictions of the witness.

---

47. United States v. Mahone, 537 F.2d at 929.

48. If trial counsel anticipates that it will be necessary to challenge the introduction of evidence of a prior conviction on the ground of undue prejudice, assuming that rule 609 is interpreted to give the trial judge the discretion to prohibit the introduction of such evidence on this ground, it is suggested that the challenge be raised by motion *in limine* filed prior to trial. An evidentiary hearing, outside the presence of a jury, might aid in giving the trial judge the facts necessary to act upon the motion. The opinion in Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), authored by then Circuit Judge Warren Burger, contains an excellent discussion of the factors relevant to a showing of unfair prejudice attendant to the introduction of evidence of certain prior crimes in certain situations.

It is apparent that the adoption of rule 609 of the Nebraska Evidence Rules has expanded the types of prior convictions which may be used to impeach credibility. This rule has also, however, most certainly changed and expanded the type of inquiry which can be made of the witness regarding the prior convictions, an inquiry once strictly structured and limited. Where once it was prohibited to make any inquiry regarding the specific nature of the crime which resulted in the prior conviction, it is now most likely that such an inquiry will be allowed. Inquiry may also be allowed into the date of conviction and the sentence imposed.

The fact that Nebraska Rule 609 will probably allow more information to be elicited regarding the prior conviction necessarily raises the question of what discretion the trial court has, if any, to prohibit such inquiry, otherwise proper under the rule, because of the threat of unfair prejudice. It is entirely possible, because of the wording of the rule, and the interpretation which has been given to Federal Rule 609, that Nebraska Rule 609 will be interpreted to prohibit the trial judge from exercising any discretion to exclude, on the basis of prejudice, evidence of an otherwise admissible prior conviction.

Because impeachment of credibility by proof of prior conviction is such a powerful tool, the need for clarification of how, and under what circumstances, such impeachment will be permitted is extremely important. Without such knowledge, defense counsel in a criminal case can hardly give his or her client, who has a prior criminal record, sound advice as to whether or not the defendant should testify. It is equally important that the prosecutor know the proper approach to impeachment under the rule so as to avoid the risk of mistrial, a concern which is also of importance to trial counsel in any case where impeachment of credibility by prior conviction is possible.

No doubt cases will be reaching the Nebraska Supreme Court in the near future which will allow the court to resolve some of the questions raised by this article. Until the court issues opinions, however, which result in a clarification of the application of rule 609, any attempt by trial counsel to properly use, or understand, this rule will necessarily give rise to an unacceptable degree of uncertainty as to its proper interpretation and application.